IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellant,

v.

NATHAN D. ROJAS,
Appellee.

No. 2 CA-CR 2018-0271
Filed August 28, 2019

Appeal from the Superior Court in Cochise County
No. CR201600734
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

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Counsel for Appellant

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and

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OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Eckerstrom and Judge Espinosa concurred.

E P P I C H, Presiding Judge:

¶1 The State of Arizona appeals the trial court's grant of a new trial to Nathan Rojas, contending the court abused its discretion in making that decision. Because we conclude the trial court acted within its discretion, we affirm.

Factual and Procedural Background

¶2 During Rojas's trial for alleged sexual conduct with a five-year-old girl, a courtroom observer, David Morgan, requested permission to record video of the proceedings on his tablet computer for posting on his social media page. Over Rojas's objection, the court granted the request, admonishing Morgan that he could not publish images of the jury in which jurors were identifiable.

¶3 Two days later, a juror received text messages from a friend, asking if the juror was serving in a case involving "a guy by the last name of Rojas and something about a daycare and a five-year-old." After the juror confirmed she was a juror in the case, the friend revealed she had seen video posted on social media of Rojas testifying at the trial. The friend said the video did not show the jurors' faces but did show the jury in the jury box. The friend claimed she had not read the story about the case but said it was "disgusting" and told the juror how to locate the social media post.

¶4 The next day, the juror informed the trial court of the friend's texts. Upon questioning by the court, the juror denied viewing the social media post, but admitted she had told several jurors there was video on social media showing the jury. She told the court she had shared the address of the social media post, and a few jurors had written down the address. Other jurors "weren't happy about" the video's existence and that their likenesses may have been publicized, according to the juror, in part because they had been assured by the court that the jury would not be shown. The juror also attributed the negative reaction to concerns about privacy: jurors did not want people to know they were on Rojas's jury.

¶5 The trial court viewed the video and determined that at least three jurors were identifiable in it, including two whose faces were shown. After Rojas moved for a mistrial, the court decided to individually question each of the other jurors regarding what they had heard about the video. Only two jurors testified they had not heard about it; the rest to varying degrees were aware of it. The report of the video had "sparked a conversation," according to a juror, who reported jurors had asked questions about the video and some had written down its internet address.

¶6 All jurors told the trial court that what they had heard would not affect how they decided the case. Several jurors confirmed that the information had raised privacy concerns, however. One stated, "[W]e don't want to be recognized of course in this case . . . because of the day and age of craziness of people." Another reported there had been a conversation expressing concern that despite the court's assurances otherwise, their likenesses had been captured. A third juror, when asked whether the information had caused her any concern, said, "Slightly, yes." A fourth juror responded more forcefully when asked if the information had concerned him:

> It did, sir. I was concerned that . . . that reporter . . . included an image of the jury, whether they were facing toward the camera or not. . . . [W]e all have friends and associates locally. And . . . if that were to hit the news, . . . it's not long before I would think every juror . . . would be known.

While that juror did not know of anyone who might retaliate against him if they did not agree with the verdict, he stated that such a thing was possible. When asked to elaborate on this concern, the juror stated:

> [T]here are many people who, when you use the phrase child molestation, without knowing any facts whatsoever, right away . . . they want . . . to hang that person . . . . And if . . . it happens to become known that you were on that jury, and the jury went a certain way, either way it goes, . . . there's a section of the population that's not going to be very happy about the result.

¶7 After questioning all the jurors, the trial court excused the juror who had exchanged texts with her friend. But the court denied the motion for mistrial, noting that none of the jurors had indicated they had heard the friend's characterization of the case as disgusting and all had indicated they would be able to be fair and impartial. The trial resumed, and the next day, the jury convicted Rojas of one count of sexual conduct with a minor under twelve years old. Rojas then filed a motion for a new trial under Rule 24.1, Ariz. R. Crim. P., contending the jurors' awareness that recognizable images of jurors had been publicized prejudiced him.

¶8 After hearing argument on the motion, the trial court granted it. In its ruling, the court found that Morgan's video recording had violated Rule 122, Ariz. R. Sup. Ct., under which cameras in a courtroom "must be placed to avoid showing jurors in any manner." That rule, according to the court

> was intended to protect jurors, but it was also intended to protect the integrity of the jury system. Persons who serve on juries must be protected from possible intimidation or reprisals for any verdicts they may reach. Jurors have the right to claim protection under the rule; but so do litigants whose cases are to be decided by juries.

The court also found that the juror who reported the video had violated several aspects of the admonition given to jurors, including instruction to not allow anyone to speak to them about the case, not accept any emails or text messages about the case, and immediately end exposure to any media coverage and report it to the court. The court added that most of the other jurors had violated the court's admonition that they must not allow anyone to talk to them about the case and immediately report instances of others talking about it.

¶9 Upon reflection, the trial court decided that it had not adequately considered the risk of prejudice from these violations when it had denied Rojas's earlier motion for a mistrial. The court noted that while jurors were aware of only one juror who had been identified in the published video, they could not know whether others were also identifiable. The court concluded with regret that its assurance to the jury that jurors' identities would be protected had been empty. The jurors, according to the court, "had reason to be concerned about their own security, and they had reason to doubt the value and efficacy of any action

the court might take to safeguard that security." Under these circumstances, the court decided it could not determine beyond a reasonable doubt that the extraneous information the jury heard did not taint the verdict.

¶10 The state timely appealed. We have jurisdiction under A.R.S. § 13-4032(2).

Discussion

¶11 "We review a trial court's decision to grant a new trial for an abuse of discretion." *State v. Fischer*, 242 Ariz. 44, ¶ 10 (2017). "[W]e 'scrutinize with care an order granting a new trial' because 'meaningful review in such cases is required to maintain the integrity of the jury trial system and the practical value of court adjudication.'" *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, ¶ 88 (App. 2012)[1] (quoting *Zugsmith v. Mullins*, 86 Ariz. 236, 237-38 (1959)). On the other hand, we generally afford the trial court wide discretion in its decision to grant a new trial because of its intimate connection to the trial, including the opportunity to directly observe testimony. *Id.* We "will not disturb an order granting a new trial unless the probative force of the evidence clearly demonstrates that the trial court's action is wrong and unjust and therefore unreasonable and a manifest abuse of discretion." *Fischer*, 242 Ariz. 44, ¶ 27 (quoting *Smith v. Moroney*, 79 Ariz. 35, 39 (1955)).

¶12 If the jury receives extraneous information related to a case, "[a] defendant is entitled to a new trial if it cannot be concluded beyond a reasonable doubt the extraneous information did not contribute to the verdict." *State v. Aguilar*, 224 Ariz. 299, ¶ 6 (App. 2010). Once it is shown the jury received extraneous information, the information is presumed to have caused prejudice, and the burden is on the state to show beyond a reasonable doubt that the extraneous information did not taint the verdict. *Id.* In determining whether extraneous information tainted a verdict, a court may consider, among other things, the trial context, which includes:

> [W]hether the material was actually received, and if so, how; the length of time it was available to the jury; the extent to which the jurors discussed and considered it; whether the material was introduced before a verdict was

[1]The standard for a grant of new trial is essentially the same in criminal and civil cases. *Fischer*, 242 Ariz. 44, ¶ 11.

> reached, and if so at what point in the deliberations; and any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.

Id. ¶ 11 (alteration in *Aguilar*) (quoting *State v. Hall*, 204 Ariz. 442, ¶ 19 (2003)).

¶13 The state does not dispute that the jury here received extraneous information related to the case. Instead, the state contends that the information received by the jurors was not evidence, and therefore cannot be grounds for a new trial under Rule 24.1(c)(3)(A), under which a trial court may grant a new trial if a juror or jurors "receiv[ed] evidence not admitted during the trial." *See also State v. Callahan*, 119 Ariz. 217, 220 (App. 1978) (courts may not grant mistrial for juror misconduct not enumerated in Rule 24.1(c)(3)).

¶14 But our supreme court has ruled that in the context of Rule 24.1, "'evidence' means any information likely to be considered by the jury in determining the guilt or innocence of the defendant." *State v. McLoughlin*, 133 Ariz. 458, 460 (1982). A new trial may be granted, for example, when a jury consults the internet for definitions of key legal terms, even though such information might not be considered evidence in other contexts. *See Aguilar*, 224 Ariz. 299, ¶ 29; *State v. Cornell*, 173 Ariz. 599, 601-02 (App. 1992). Similarly, the extraneous information the jury received here, though it would not be considered evidence in other contexts, was of a kind that jurors might consider in reaching their verdicts, particularly in a case with potential to generate controversy or moral outrage. It therefore falls within the range of extraneous information that may provide a basis for a new trial under Rule 24.1(c)(3)(A).

¶15 We reject the state's suggestion that *State v. Nelson*, 229 Ariz. 180 (2012), narrowed the scope of extraneous information that can warrant a new trial under Rule 24.1(c)(3)(A). The state focuses on language in *Nelson* that "[p]rejudice cannot be presumed without the requisite showing that the jury received and considered extrinsic evidence on the issues." *Id.* ¶ 12 (quoting *State v. Davolt*, 207 Ariz. 191, ¶ 59 (2004)). Emphasizing the words "on the issues," the state suggests that *Nelson* narrowed the definition of evidence in Rule 24.1(c)(3)(A) to exclude extraneous information like the jury received here. But the court in *Nelson* had no occasion to analyze the nature of extraneous information jurors had received, because the jury had not received any. *See* 229 Ariz. 180, ¶¶ 11-13. There, a person on the venire

had researched the case on the internet, but that person admitted the conduct during voir dire and was excused, and there was no evidence that the person had shared his research with the jurors ultimately selected. *Id.* ¶¶ 10-11. The defendant therefore could not show that the jury had received any extrinsic information, and the trial court denied his request for a new trial for that reason—not because information received was not evidence within the meaning of Rule 24.1(c)(3)(A). *See id.* ¶¶ 12-13. Thus, we do not read the words "on the issues" in *Nelson* to narrow the range of extraneous information that may provide the basis for a new trial. And at any rate, information of the kind the jury received here has the potential to influence a jury on the ultimate issue of guilt or innocence and thus is, in a broad sense, "on the issues."

¶16 Nor do we read *Davolt*, in which the quoted language in *Nelson* originates, to narrow the scope of Rule 24.1(c)(3)(A). In *Davolt*, the defendant requested a new trial based on an allegation that a juror had been seen carrying a newspaper during trial. 207 Ariz. 191, ¶¶ 53-54. Missing, however, was any allegation that the newspaper contained any content concerning the trial, or that any content about the trial had ever been published in the local newspapers. *Id.* ¶ 57. Because "there was no allegation that newspapers contained even a remote statement concerning issues pending before the jury," the court refused to presume that the extraneous information contained in the newspaper prejudiced the defendant. *Id.* ¶ 59. *Davolt* thus establishes that a showing that jurors received extraneous information will not of itself establish a presumption of prejudice if there is no showing that the information had anything to do with the case. It contains no analysis suggesting that the information Rojas's jury received, which unquestionably related to his case and had the potential to influence jurors' decisions on the ultimate issue of guilt, does not fall within the scope of Rule 24.1(c)(3)(A).

¶17 The state also argues there was no evidence jurors considered the extraneous information. Their testimony indicates they did consider it, however. Even though all the jurors professed that the extraneous information would not affect their deciding the case—and may all have sincerely believed that—the statements of several of them suggest a concern that the published video increased the risk, however remote, that they might personally suffer adverse consequences if they acquitted Rojas. Moreover, the information reached nearly all of the jurors and prompted significant discussion among them just one day before they delivered their verdict. These facts formed a basis upon which the trial court could reasonably conclude it could not determine "beyond a reasonable doubt the extraneous information did not contribute to the verdict." *Aguilar*, 224 Ariz.

299, ¶ 6. Moreover, the judge had the "unique opportunity" to observe the jurors and "determine through his observations that the trial had been unfairly compromised; in contrast, we have only a cold record, which does not convey voice emphasis or inflection, or allow us to observe the jury and its reactions." *Cal X-Tra*, 229 Ariz. 377, ¶ 92.

¶18 The state next points to testimony from the jury foreman that the jury did not discuss the video during its deliberations, arguing that it negated any reasonable doubt that the extraneous information affected the verdict. But that testimony occurred at a hearing on Rojas's release conditions two weeks after the court had granted the new trial. It was not offered in support of a motion to reconsider the grant of new trial, but rather to show that Rojas should not be released. Thus, even were we to accept the premise that the foreman's testimony conclusively resolved any reasonable doubts about the integrity of the verdict, it would not establish that the court abused its discretion in granting the new trial because the testimony did not exist when the court made its decision.

¶19 The state additionally argues the trial court did *not* abuse its discretion in denying Rojas's initial motion for mistrial. In support, the state points out that in denying the motion for mistrial, the court questioned each juror to determine the impact of the extraneous information and properly considered less drastic alternatives to a mistrial. This argument, which does not contain any claim of error, serves only to show that the court acted methodically and reflected carefully before it ultimately granted a new trial. The state does not cite, and we are not aware of, any authority precluding the court from reconsidering its earlier findings and conclusions when it considered the motion for new trial.

¶20 Finally, although the state concedes Morgan's violation of the court's restrictions constituted trial error, it argues the error was harmless. This argument is premised on the state's position that the court was compelled to conclude "the verdict was not tainted or affected" as a result of Morgan's actions—a position we have discussed and rejected above. And while the state speculates that the new trial order was a misdirected attempt to address Morgan's misconduct and argues it is "an unfair penalty to the State, particularly given the absence of misconduct by the State," the court had discretion to grant a new trial for juror misconduct even though the state was without fault. *See* Rule 24.1(c)(2), (3) (establishing state's misconduct and juror misconduct as separate, independent grounds for new trial).

¶21 In sum, evidence supports the trial court's decision that it could not beyond a reasonable doubt conclude that the extraneous information the jury received did not contribute to the verdict. The court therefore did not abuse its discretion in granting Rojas a new trial.

Disposition

¶22 We affirm the trial court's ruling granting Rojas a new trial.